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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 232

UNITED STATES OF AMERICA, APPELLANT

v.

BOSTON AND MAINE RAILROAD, PATRICK B. MCGINNIS, GEORGE F. GLACY, AND DANIEL A. BENSON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the district court (R. 30–31) is reported at 225 F. Supp. 577.

JURISDICTION

The decision of the district court dismissing Count I of the indictment was rendered on December 3, 1963 (R. 30–31). On January 2, 1964, the United States filed a notice of appeal, and this Court noted probable jurisdiction on October 12, 1964 (R. 39). Since the district court's order dismissing Count I was based solely upon the court's construction of Section 10 of the Clayton Act, this Court has jurisdiction to review

that order on direct appeal under the Criminal Appeals Act, 18 U.S.C. 3731.

QUESTION PRESENTED

Section 10 of the Clayton Act prohibits a common carrier with officers who have "any substantial interest in" another corporation from having commercial dealings with that corporation in an amount exceeding $50,000 annually, except on the basis of competitive bidding. The question presented is whether officials of a carrier who entered into an agreement and understanding with another firm under which they (1) arranged to assist the other firm in profiting from dealings in property acquired from the carrier without competitive bidding and (2) were to and did receive a substantial share of the other firm's resulting profits, had a "substantial interest" in such firm.

STATUTE INVOLVED

Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 20, provides in pertinent part:

> No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager,

or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. * * *

* * * * *

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

STATEMENT

Count I of a two-count indictment (R. 8–13), returned on August 13, 1963, charged the Boston and Maine Railroad (the "B & M") and three of its officers (Patrick B. McGinnis, President and Director; George F. Glacy, Vice President; and Daniel A. Benson, Vice President) with violating Section 10 of the Clayton Act. That section requires that dealings between an interstate common carrier and another corporation in the amount of more than $50,000 in any one year be conducted by competitive bidding "when the said common carrier shall have upon its board of

directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has *any substantial interest in*, such other corporation * * * (emphasis added)."

Count I charges (R. 8–10) that, without competitive bidding, the B & M sold 8 stainless steel passenger coaches and 2 stainless steel combination baggage coaches valued in excess of $50,000 to the International Railway Equipment Corporation ("International"), and that the B & M "had upon its board of directors and as its president a person, and had as its selling officer and as its agent in the particular transaction a person, who at the same time had a substantial interest in" International. McGinnis, Glacy and Benson were named as defendants under the provision of Section 10 that makes every "director, agent, manager, or officer * * * who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation * * *" guilty of a misdemeanor.[1]

[1] Count II of the indictment is based upon the same transaction as Count I, and charges defendants McGinnis, Glacy, Benson, International and Henry Mersey, President of International, with violating 18 U.S.C. 660. That section provides:

> Whoever, being a president, director, officer, or manager of * * * [a] corporation engaged in commerce as a common carrier, * * * embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets * * * or willfully or knowingly converts the same to his

The government filed a bill of particulars which stated that the substantial interest that McGinnis and Glacy had in International was an "understanding, agreement * * * and concert of action among the said defendants McGinnis, Glacy and International, and others, for * * * the purpose of producing profits for

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own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

* * *

Count II alleges as follows (R. 10–13): About April 30, 1958, Waldo E. Bugbee, a dealer in used railroad equipment, attempted to obtain from B & M Vice President Glacy an option to purchase 10 B & M coaches then in service at a suggested purchase price of $500,000 for resale to an undisclosed third party. Glacy refused to grant the option, and McGinnis and Glacy instructed B & M officials that no direct dealings should be had with Bugbee, and that Mersey, President of International, would handle the sale of B & M's coaches. Mersey then contacted Bugbee and indicated that he, Mersey, had the right to sell the B & M equipment. Mersey negotiated the sale to Bugbee's client, the Wabash Railroad, and at no time purported to act as an agent or broker for the B & M.

Upon the recommendation of Benson and Glacy, the B & M board of directors, with the concurring vote of McGinnis, directed that the 10 coaches be withdrawn from service and sold. Under the direction of the individual defendants, the coaches were sold on August 14, 1958, to International for $250,000, which was paid by a check post-dated to August 22, 1958. On August 15, 1958, one day later, International resold the coaches to a Wabash subsidiary for $425,000. Within a short time after the transfer of the equipment, International paid McGinnis $35,000, Glacy $25,000 and Benson $11,500 from funds that were derived almost entirely from the proceeds of International's resale of the coaches to the Wabash.

The indictment also alleges that between July 1, 1958, and June 30, 1959, International's gross sales, which amounted to approximately $480,000, consisted almost exclusively of the resale of equipment acquired from B & M (R. 10).

International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies" (R. 24–25). All defendants moved to dismiss Count I, upon the ground that the indictment, as amplified by the bill of particulars, did not allege facts sufficient to constitute an offense under Section 10.

On December 3, 1963, the court granted the motions to dismiss "on the basis of my construction of the statute." The court ruled that "the words 'any substantial interest' as used in the statute do not cover a situation such as here presented. The statute is limited to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International" (R. 30–31).

ARGUMENT

APPELLEES VIOLATED SECTION 10 OF THE CLAYTON ACT BY SELLING THE CARRIER'S PROPERTY WITHOUT COMPETITIVE BIDDING TO A CORPORATION IN WHICH THE CARRIER'S OFFICERS AND DIRECTORS HAD A SUBSTANTIAL INTEREST

INTRODUCTION AND SUMMARY

Section 10 of the Clayton Act prohibits a common carrier from engaging in more than $50,000 worth of annual "dealings in * * * supplies, or other articles

of commerce * * * with another corporation * * * when the said common carrier shall have upon its board of directors or as its president * * * or as its * * * selling officer * * * any person * * * who has any substantial interest in such other corporation" unless the dealings are conducted through competitive bids. The history of the statute confirms what its language plainly states: that it is intended to prevent the officials of a carrier from causing it to deal on unfavorable terms with another firm in whose profits the carrier's officials expect to share. This is precisely what the district court found was the nature of the scheme described in the indictment: "an illegal and illicit plan to siphon off for [the individual appellees'] personal benefit property of the Boston and Maine Railroad through the medium of International" (R. 31).

Boston and Maine's president and director, McGinnis, and its vice president, Glacy, arranged to assist International in making profits from dealings in property of the Boston and Maine in exchange for a part of the profits to be made from the resale of that equipment. We contend that an arrangement under which a carrier's officers are to share in another firm's profits derived from resale of property bought from the carrier gives the officers a "substantial interest" in that other firm within the meaning of Section 10. The statute was intended to require competitive bidding wherever carrier officials have any conflicting interest in a firm dealing with the carrier substantial enough to cause them to favor that firm to the detriment of

the carrier. An interest in a purchaser's profits from resale of carrier property is obviously such a conflicting interest. The interests of McGinnis and Glacy in International thus fall squarely within the coverage of the Act.

A. OFFICERS OF THE BOSTON AND MAINE WERE TO RECEIVE PART OF THE PROFITS MADE BY INTERNATIONAL THROUGH ITS DEALINGS IN PROPERTY ACQUIRED FROM THE CARRIER.

The government's indictment and bill of particulars charge that the Boston and Maine's president and director, McGinnis, and its vice president and selling officer, Glacy, had substantial interests in International's profits from its dealings in property acquired from the carrier. They had entered into an arrangement with International for "the purpose of producing profits for International from dealings by it in property acquired from the B & M" through their assistance (R. 25). Pursuant to this arrangement for producing profits for International, McGinnis and Glacy were to receive substantial sums (R. 25), *i.e.,* they were to share in or receive part of the profits which the arrangement was intended to create for International on resale of the property. As the district court found, the scheme was to benefit them "through the medium of International" (R. 31).[2]

The allegations of Count II of the indictment, charging a different violation arising out of the same

[2] International was, indeed, little more than a shell at the time. It made the $250,000 purchase with a post-dated check which it covered by the proceeds of the immediate resale (R. 12). Its entire business for the year consisted "almost exclusively" of reselling B & M equipment, and the sale of the 10 coaches involved herein accounted for $425,000 of its $480,000 total sales (R. 10).

transaction, spell out the details of the transaction and show clearly that McGinnis and Glacy were to share in the profits which they had agreed to help International make. They were instrumental in selling the carrier's cars to International at a price of $250,000, although they knew of an opportunity for sale to a third party at twice that price (R. 11–12). They saw to it that the Boston and Maine did not sell the cars to anyone except International, and referred International's president to the agent of the ultimate purchaser (R. 11–12). International sold the cars for $425,000 the day after buying them from the Boston and Maine for $250,000, a sum which it had paid with a post-dated check (R. 12). Shortly after the sale and resale of the ten railroad cars, McGinnis received $35,000 or one-fifth of the $175,000 overall profit on resale; Glacy received $25,000 or one-seventh of the profit (R. 12).[3] These sums "were derived almost entirely out of the proceeds from the resale by International of the said 10 coaches" (R. 12).

In short, in exchange for part of International's profits, McGinnis and Glacy agreed to and did participate with International in the entire course—both purchase and resale—of its transactions in cars acquired from the Boston and Maine. Their claim to a substantial share in International's profits from dealings in property acquired from the carrier created a real interest in International, comparable to the interest of a shareholder or partner of that firm, and greater than the interest a carrier official would have in a

[3] Benson, also a vice president of the carrier received $11,500 (R. 12).

company which paid him a cash bribe for favoring it in its dealings with the carrier. Here, McGinnis and Glacy shared in and, indeed, depended upon the profits they and International together could make from dealings in property acquired from the carrier without competitive bidding. If International did not profit, they might receive nothing; International's welfare was their welfare. They were not simply the recipients of illegal cash payments for selling carrier property at a low price to a firm in which they had no continuing interest.

B. A CLAIM TO RECEIVE PART OF THE PROFITS A CORPORATION REALIZES FROM DEALINGS IN PROPERTY ACQUIRED FROM A CARRIER IS A "SUBSTANTIAL INTEREST IN" THAT CORPORATION WITHIN THE MEANING OF SECTION 10 OF THE CLAYTON ACT.

1. *The language of the statute*

The language of Section 10 of the Clayton Act was carefully chosen to protect the nation's common carriers from the economic injury they might suffer if substantial purchases and sales were made, without competitive bidding, between the carriers and firms in which the carriers' officers and directors had significant conflicting interests.[4] The federal policy has three aspects: (1) protecting the strength of the national transportation system; (2) maintaining the

[4] In discussing a situation where the carrier was a purchaser, rather than a seller as in the present case, this Court stated: "The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest." *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 190.

integrity of the assets and accounts upon which rate regulation rests; (3) preserving the system of free and fair competition among industries dealing with carriers. To these ends, the statute condemns specific categories of dual relationships which create a conflict of interest on the part of carrier officials sufficiently serious that they might favor another firm at the expense of the carrier, *i.e.*, where the carrier's (a) director, (b) president, (c) manager, (d) purchasing or selling officer, or (e) agent in the particular transaction is a (1) director, (2) manager, or (3) purchasing or selling officer of the firm with which the carrier is dealing. In addition, the act has a fourth general category of proscribed relationships—where the carrier's official or director "has any substantial interest in" such other firm.

The latter broad phrase—"any substantial interest in" such other firm—is obviously intended to cover any other form of dual relationship which, like the categories specifically enumerated, might cause the carrier's official to favor a firm dealing with the carrier to the detriment of the carrier. The language covers any practical or pecuniary interest in the profits of another firm substantial enough to give rise to the divided loyalties that result from having a "conflict of interest."[5] It might be argued that receipt of a cash

[5] In *Securities and Exchange Commission* v. *Dumaine*, 218 F. 2d 308 (C.A. 1), the court interpreted an SEC regulation providing that no securities of a public utility holding company in reorganization should be bought or sold in any transaction in which any person connected with a committee of holders of the company's securities had "any beneficial interest, direct or indirect." The court held that that phrase included "every property or contract right, legal or equitable, in securities traded by any one of the persons specified in the Rule. But we do not

bribe for favoring another firm in its dealing with a carrier does not create a sufficiently continuing interest in that other firm, for the other firm's success or failure in its dealing might remain a matter of relative indifference to the recipient of the bribe. But a claim to a part of the profits a corporation realizes from resale of property acquired from the carrier is plainly a "substantial interest" in the purchasing corporation, giving the carrier official a highly significant stake in its profits and welfare. Like its shareholders, he will profit if the purchasing corporation profits from its dealings. Unlike its shareholders, he has no vote in the selection of its officers, and he expects to share in the profits from limited dealings rather than the totality of its operations—but these differences are irrelevant in the context of the

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think that the Rule must necessarily be construed as limited in its reference to recognized legal or equitable rights" (218 F. 2d 315). Recognizing that the purpose of the rule was to assure that committee members should serve but one master, the court held that the prohibition covered trading in securities by the wife of a committee member.

See also *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, where an agent of the United States was held to have violated the federal conflict of interest statute because of a possibility that a contract might be made with a corporation of which he was an officer. In *Tuscan* v. *Smith*, 130 Maine 36, 153 Atl. 289, and *Cordingley* v. *Borough of Mendham*, 12 N.J. Misc. 331, 171 Atl. 158, a creditor's interest was held covered by a municipal conflict of interest statute. See, *contra*, *Morrow* v. *Strickler*, 259 Pa. 60, 102 Atl. 282; *Wilson* v. *New Castle*, 301 Pa. 358, 152 Atl. 102. And in *Adams* v. *United States*, 302 F. 2d 307 (C.A. 5), a personal, non-financial interest in the outcome of a case was held sufficient to disqualify a judge.

statute, for none lessens his conflicting interest in the profits of the purchasing corporation.

Of even greater importance to the purposes of Section 10, a carrier official with this interest in another corporation is, realistically, a representative of that corporation for purposes of its dealings with the carrier. The present case is illustrative. Short of 100 percent ownership of International, it is difficult to conceive of a scheme better calculated to create in the carrier's officers a substantial conflicting interest in International's profits from dealing with the carrier. Ownership of even substantial amounts of International's stock—unquestionably covered by the statute—might still leave McGinnis and Glacy with interests in that corporation too diluted to assure their primary loyalty to International, rather than to the Boston and Maine, in dealings between the two. The interest in International resulting from being a salaried "director, manager, or purchasing or selling officer" of that corporation would be far less immediate and substantial. The instant arrangement to benefit from the profits of International's dealings in Boston and Maine property made the individual appellees' interest in International's gain from any transaction with the carrier directly dependent upon the extent of their departure from their fiduciary obligation: the greater the harm to the carrier from an inadequate sales price, the more certain and greater the profits to International of which they would receive a substantial part.

That McGinnis and Glacy had the type of conflicting interest which the statute condemns is, finally,

established by a comparison of the arrangement they employed to another practically identical form of interest which the statute indisputably reaches. Had they entered into a partnership with an unincorporated firm or with Mersey as an individual to conduct the very dealings in property acquired from the Boston and Maine which are here alleged, their claim to a part of the profits would indisputably constitute a "substantial interest in such * * * partnership." The result should not be different because the "arrangement" was with a corporation.

The plain meaning of the words "any substantial interest" in the context of a statute dealing with conflicting relationships of carrier officials dictates the conclusion that Section 10 requires competitive bidding where the carrier officials have a claim to part of another corporation's profits from dealings in property acquired from the carrier. Since Congress was dealing with recognized acts of abuse of position—in light of traditional concepts of fiduciary duty—statutory language which parallels established rules of fiduciary duty should be given its full effect. *Cf.*, *Burton* v. *United States*, 202 U.S. 344.[6] The statute merely requires competitive bidding under

[6] Fiduciaries have always been forbidden "to occupy a position which [would] conflict with the interest of parties they represent, and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act and then personally participate in the benefits." *Wardell* v. *Union Pacific R. Co.*, 103 U.S. 651, 658; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590; *Corsicana Nat'l Bank* v. *Johnson*, 251 U.S. 68; *Pepper* v. *Addicks*, 153 Fed. 383, 405 (E.D. Pa.).

penal sanctions in situations where the most rudimentary concepts of honest dealing would otherwise be violated. To that end it provides that officers, directors, and agents of interstate common carriers must use competitive bidding when selling carrier property to a company in which they have any interest, whatever its nature, whenever it is "substantial."[7] This very plainly includes what may be the most serious form of conflicting interest in another company, an interest in the purchaser's profits from dealings in property acquired from the carrier.

2. *The legislative history*

The background, legislative history, and contemporary interpretation of Section 10 of the Clayton Act confirm the plain meaning and obvious purpose of its words: that it was intended to forbid officers and directors of a common carrier from dealing privately with other corporations *wherever* the officers and directors have substantial, conflicting interests on both sides of the transaction. As stated by a Congressman at the time the Act was passed, Section 10 was meant to prevent "conspiracies on the part of the officers of railroads and supply companies to loot the treasuries of the railroads, thereby crippling the arteries of commerce for their personal aggrandizement" (Congressman Fitzhenry, 51 Cong. Rec. Appendix, p. 1181).

[7] Neither congressional purpose nor plain language permits reading "any substantial interest" as "any [then present legal and] substantial interest," as the court below did (R. 31), thereby excluding a future contingent interest, an illegal interest, and an equitable interest.

(a) Congress was aware of two separate harms resulting from the widespread practice of corporate officers and directors having interests in several corporations. Prior to becoming a Justice of this Court and shortly before passage of the Clayton Act, Louis D. Brandeis stated both harms in classic form. In *Other People's Money* (1914), pp. 51–52, he pointed out that:

> The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters * * *.
>
> The term "Interlocking directorates" is here used in a broad sense as including all intertwined conflicting interests, whatever the form, and by whatever device effected. The objection extends alike to contracts of a corporation whether with one of its directors individually, or with a firm of which he is a member, or with another corporation in which he is interested as an officer or director or stockholder. * * *

The harm to competition resulting from interlocking directorates among supposedly competing corporations had been revealed by such investigations as those of the Pujo Committee.[8] It was dealt with by Section 8 of the Clayton Act, which flatly prohibits any person from being a director in certain competing corporations if one has capital in excess of one million

[8] *Money Trust Investigation. Investigation of Financial and Monetary Conditions in the United States under House Resolution Nos. 429 and 504 before a Subcommittee of the Committee on Banking and Currency*, 62d Cong.

dollars, "other than banks, banking associations, trust companies and common carriers." Bank directors, officers, and employees were also prohibited from holding interlocking positions under specifically described circumstances.

Section 10 of the Clayton Act was primarily intended to deal with a different harm.[9] As applied to corporations in a buyer-seller relationship, the primary evil of "interlocking directorates," in the broad sense in which Brandeis used this term, was the violation of fiduciary duties. The resulting loss to corporations was of public concern where common carriers were victimized. Striking examples in the era just prior to the passage of the Clayton Act involved the financial collapse of the once prosperous New York, New Haven & Hartford Railroad and the Northern Pacific Railroad. Serious injury to other railroads had also resulted. See, *e.g.*, 51 Cong. Rec. 9185, 9261, 15942–15944, 16271. The report of the Interstate Commerce Commission on the collapse of the New Haven demonstrated that the problem of divided interests was not limited to interlocking directorates and multiple shareholdings. The New Haven, for example, had purchased some $37,000,000 worth of cars from James B. Brady who had made substantial gifts to the officials with whom he dealt. *In re Financial Transactions of the New York, New Haven & Hartford Railroad Co.,* 31 I.C.C. 32, 61; S. Docs. 544 and 543, 63d Cong., 2d Sess.

Senator Nelson described another form of the then-prevalent abuses with which Section 10 was con-

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[9] The 1914 Act did not prohibit interlocking directorates among rival railroads. This step was taken in 1920. 41 Stat. 494, 49 U.S.C. 20a(12).

cerned: "[O]ne of the evils railroad companies have been suffering from for years has been the fact that their officials and directors have organized and maintained what you might call supply companies—companies that are manufacturing machinery, equipments, and other things for the use of the railroad, and doing construction work for them—and in order that it might prove mutually profitable generally the leading officers and managers and the leading manipulators of the railroad companies were connected with these companies, which I, for short, shall call supply companies, furnishing supplies to the railroad companies. In every case where supplies were bought from these concerns the buyer and the seller were the same" (51 Cong. Rec. 15942).[10]

[10] As early as 1873 Congress had sought to enable the Attorney General to recover some of the wasted properties of the Union Pacific Railroad Company. This Court described the action which the Attorney General subsequently brought in *United States* v. *Union Pacific Railroad Co.*, 98 U.S. 569, 609-610, as follows:

> The substance of the charge is, that the board of directors of the railroad company made contracts for building the road, and for running the Pullman cars on it, and for mining its coal lands and purchasing the coal so mined, which were a fraud upon the company; that these contracts allowed exorbitant prices for work done and material furnished; that otherwise they were very advantageous to the other contracting parties and injurious to the company; that in all of them the directors, or a controlling majority of them, were interested adversely to the company: that in fact they were, in the name of the company, making contracts with themselves as the other party. In short, it may be taken for granted that if these allegations are true, as they must be held to be on demurrer, frauds more unmitigated than those set forth in this bill were never perpetrated on a helpless corporation by its managing directors.

(b) President Wilson's message to the Congress of January 20, 1914, dealing with the subject of "trusts," laid down the broad outline of what later became the Clayton Act (51 Cong. Rec. 1962–1964). The purpose of the new legislation was basically "to give expression to the best business judgment of America, to what we know to be the business conscience and honor of the land." In the course of his message, the President noted the need "for laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business."

In support of the President's purpose to solve the problem of corporate officials dealing with themselves in different capacities, Section 9 of the House bill (the predecessor of Section 10) flatly prohibited any person "who is engaged as an individual, or who is a member of a partnership, or is a director or other officer of a corporation" that sells to or provides construction or maintenance services to a common carrier from acting as a "director or other officer or employee of [the] carrier."[11]

The Senate made two major changes in the House bill. First, it decided that the problem of securing

[11] See H.R. 15657, as it passed the House. S. Doc. 584, 63d Cong., 2d Sess., p. 10.

honest dealings could best be resolved, not by prohibiting office-holding, which might be too inflexible in emergency situations, but by requiring competitive bidding.[12] The Senate Committee Report noted that the "prime object" of the House provision was (S. Rep. 698, 63d Cong., 2d Sess., pp. 47–48):

> to prevent common or interlocking directors in corporations which occupy the relations to each other which are thus described; and is mainly intended to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers, often being practically both seller and purchaser * * *.

The harms of such dual relationships could be prevented by requiring the carrier to use competitive bidding where they were present, although the seemingly anomalous result of imposing the primary obligation upon the carrier was to subject it to penalties for acts of its officers or directors which were intended to victimize the carrier.[13]

The second major change made by the Senate was to close the gaping loophole left by a bill which for-

[12] S. Rep. 698, 63d Cong., 2d Sess., p. 47.

[13] Appellee Boston and Maine urged in its Motion to Affirm that the statute should not be applied to a secret arrangement such as that alleged because of the resulting unfairness to the carrier. But the statute plainly imposes an absolute liability on the carrier, although it is typically the unknowing victim of the harms proscribed by the statute. The carrier can never know of its officials' undisclosed equitable interests in the stock of another corporation or secret partnership interests, although these are plainly covered by the statute. As a practical matter, it will never even know of ordinary shareholdings by its officials in companies with which it deals, unless the officials volunteer this information.

bade carrier officials from occupying certain enumerated positions in a firm dealing with the carrier, but left them free to have other equally serious conflicting interests in that firm. To close this gap the Senate bill required competitive bidding when any person serving as a director, "president, manager, or purchasing officer or agent" of a common carrier was also "an officer, director, manager, or agent of, *or * * * has any direct or indirect interest in,"* any firm with which the carrier had "dealings in securities, railroad supplies or other articles of commerce or contracts for construction or maintenance of any kind to the amount of more than $50,000 in any one year." (Emphasis added.) (S. Doc. 584, 63d Cong., 2d Sess., p. 13.)[14]

The conference bill adopted the general approach of the Senate bill. Without explanation, it changed the phrase "any direct or indirect interest in" to the present wording, "any substantial interest in" (S. Doc. 584, 63d Cong., 2d Sess., pp. 13–14; 51 Cong. Rec. 15791). But, the discussion of the phrase "any

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[14] In presenting the conference bill to the Senate, Senator Chilton explained the essential difference between the Senate and House bills (51 Cong. Rec. 16002): "* * * instead of undertaking to regulate the matter of interlocking directors through the personnel of the board, it [the Senate bill] dealt directly with the evil, which was the objectionable transaction. It made it a criminal offense for certain officers of a common carrier to deal in securities or supplies, or make contracts with another corporation where there were interlocking directors and officers, unless the transaction was by competitive bidding * * *. [I]t makes it impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations. * * *"

substantial interest in" in the debate on the conference bill confirms the view that those words were intended to reach any situation where a director or official of a common carrier, although not serving in an official capacity in the other firm, had a relationship to that firm that would likely lead him to favor it to the detriment of the carrier. In short, the phrase was intended to reach the kind of divided loyalties that give rise to a "conflict of interest," *i.e.,* where someone is "interested in" the other party to the transaction.

Senator Chilton, one of the conferees, described the prohibition in its application to the sale of carrier securities, as covering "anyone who at the same time occupies a trust capacity or *is interested in* another corporation with which the dealings may be had" (51 Cong. Rec. 16003; emphasis added). He also pointed out (51 Cong. Rec. 16002) that Section 10 "makes it impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," and that its purpose was to enforce "honest, open methods * * * in purchasing and constructing by the common carriers. No honest management has anything to fear from this section, but it has a severe penalty that will deter the dishonest manipulator" (*id.* at 16003). He explained (*id.* at 15943):

> It not only prevents corporations which are interlocked by officers and directors, but it says: "Or who has any substantial interest in such of them."

The Senator will recall all we had before us, the ease by which interlocking directorates

could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself.

* * * * *

* * * They can not dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the common carrier in the supply company, as the Senator chooses to call it, then it is prohibited.

(c) Our interpretation of the statute is confirmed by the contemporary understanding of the railroad industry itself. Congress did not make the requirements of Section 10 effective immediately,[15] and the Interstate Commerce Commission held hearings in 1916 on what regulations should be issued as to the form and procedures for competitive bidding. The first industry witness was Alfred P. Thom, General Counsel, Southern Railway Company, who was appearing "to look after the interests of the railroads and the association" (American Railway Association).[16] Mr. Thom sought, unsuccessfully, to have the Commission lay down rules as to how much stock would constitute a "substantial" interest and his testimony focused on stock interests.[17] But he had no doubt as to the principle involved in the statute, which

[15] The statute was not to become effective until two years after its approval.

[16] *Administration of Section 10 of the Clayton Anti-Trust Act, Ex Parte* 54, pp. 4–5, 7 (June 20, 1916).

[17] We have filed with the clerk and served upon opposing counsel, copies of Mr. Thom's testimony.

is precisely the issue before the Court. He said (pp. 13–14):

> The President of the United States, in January, 1914, brought to the attention of Congress what he conceived to be a wrong existing in the matter of dealings between common carriers and others, and he expressed the principle in this way:
>
> "The borrower and the lender, the purchaser and the seller, should not be the same person. The purchaser, if a common carrier, is managed by officers who occupy a fiduciary relation; they owe duties to their stockholders and to their creditors and to the public. They cannot act merely as individuals, prompted by their private gain, and acting in that fiduciary capacity, they should not be confronted by a situation of temptation, where, as individuals, they have an interest on the other side which will disturb and perhaps destroy the fairness of the performance of their fiduciary duty."
>
> Now Section 10 is the response of Congress to that recommendation of the President. It should be construed and it should be enforced for the purpose of carrying that into effect, * * *

(d) In view of the Congressional intention "to arrest the practice of the same persons occupying conflicting and incompatible relations in the corporate dealings of common carriers" and to make it "impossible for officers of a common carrier to traffic and deal with those who conduct both sides of the transaction to the profit of individuals who may conduct the negotiations," Congress could not have

intended to require competitive bidding where the carrier's president is merely one of several directors of the firm with which it deals, but not to require such protection where he stands to share in the profits which the other firm receives as a result of its dealings with the carrier. The understanding which McGinnis and Glacy had with International was far more likely to influence them to favor International at the expense of the B & M than would be the case if one of them were merely a director of International but were not to receive any portion of its profits. In the latter situation, the statute would plainly apply; the result must, we submit, be the same in the present case where the danger of injury to the carrier is far greater.

CONCLUSION

For the foregoing reasons we submit that the judgment of the district court should be reversed and the case remanded for trial.

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